No. 15580

# In the United States Court of Appeals for the Ninth Circuit

E. S. McKendry, Florence Lowe Barnes, also known as Pancho Barnes and William Emmert Barnes, appellants

*v.*

United States of America, appellee

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION*

## BRIEF FOR THE UNITED STATES, APPELLEE


**PERRY W. MORTON,**
*Assistant Attorney General,*
**LAUGHLIN E. WATERS,**
*United States Attorney,*
*Los Angeles, California,*
**JOSEPH F. McPHERSON,**
**ALBERT N. MINTON,**
*Assistant United States Attorneys,*
*Los Angeles, California,*
**ROGER P. MARQUIS,**
*Attorney, Department of Justice,*
*Washington, D. C.*

# INDEX



## CITATIONS





451736—58——1

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### OPINIONS BELOW

A memorandum opinion of Judge Beaumont in March 1954 denying a motion to dismiss and setting a date for delivery of possession (R. 29–34) is not reported. Opinions of this Court dismissing attempted appeals from orders issued pursuant to the March memorandum (R. 49–54) are reported at 219 F. 2d 357. An order denying motions to dismiss and to set aside the Declaration of Taking of Judge Jertberg in October 1955 (R. 159–170) is not reported.

### JURISDICTION

The jurisdiction of the district court of this condemnation proceeding brought by the United States was invoked under the provision of the Act of August

1, 1888, 25 Stat. 357, 40 U. S. C. sec. 257, the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. sec. 258 (a) and other statutes cited in the complaint (R. 4). Final judgment was docketed and entered November 13, 1956 (R. 196). A timely motion for new trial was denied by order entered December 17, 1956 (R. 200–201) and notice of appeal was filed February 11, 1957 (R. 201–203). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

## STATUTE INVOLVED

The relevant portion of section 1 of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. sec. 258(a) is set out in the Appendix, *infra,* p. 16.

## QUESTIONS PRESENTED

1. Whether the change of the caption of a Declaration of Taking to conform to its filing in a separate condemnation proceeding rather than by amendment of a pending proceeding is a material alteration rendering the declaration a nullity, and, if so,

2. Whether the trial court's ruling holding the declaration valid prejudiced the condemnees when there is no indication that their compensation might otherwise have been more.

## STATEMENT

While many other questions were raised in the course of the proceedings of this case and five issues were raised in the statement of points to be relied upon an appeal filed in the trial court (R. 203–205);

the specifications of error in appellant's brief (p. 5) present only the narrow question relating to alleged alteration of the Declaration of Taking. Most of the material in the record can consequently be ignored and the facts essential to decision of the single issue may be summarized as follows:

In 1952 the Department of the Air Force was undertaking expansion of the Edwards Air Force Base in Kern County, California. Appellants land consisting of some 360 acres was required for that purpose. Purchase negotiations having failed, the institution of condemnation proceedings became necessary. There was then pending a case to acquire lands for the Edward Air Force Base entitled *United States* v. *1710.73 Acres of Land, Etc.,* numbered Civil 1201–N. D. By letter of February 3, 1953, the Assistant Secretary of the Air Force transmitted to the Attorney General a Declaration of Taking executed the same day covering appellant's lands. The Declaration had been drafted on the assumption that it would be filed in case Civil 1201–N. D. and hence had the caption of that case and was designated Declaration of Taking No. 2. The Assistant Secretary's letter requested that the necessary action be taken to amend the proceedings. The appropriate instructions and the Declaration of Taking were transmitted to the United States Attorney. A few days later that official requested authority to file a separate proceeding rather than amend the pending case for several stated reasons (R. 113–115).

The requested authority was given by telegram dated February 25, 1953, and on February 27, 1953, the complaint in this case, No. 1253 N. D. — Civil was filed (R. 3–7). At the direction of August Weymann, the attorney in charge of the case, the Declaration of Taking was conformed to the procedural change by correcting the title of the cause, the civil number and the title Declaration of Taking No. 2 (R. 168–169, 553–554). The printed record does not show the changes since, as is customary, the title of the district court and the cause was printed only once (R. 7, 80). One change was made in the text of the declaration which was to strike the word "amended" referring to the complaint in paragraph 2 (See R. 9, line 9, R. 80).

On March 2, 1953, an *ex parte* decree was entered on the Declaration of Taking (R.13–17). Fifteen days later, the Attorney General transmitted to the Secretary of the Air Force a letter stating that valid title had vested in the United States and enclosing certified copies of the complaint and the decree on the Declaration of Taking (R. 128–129).

Title to the property was vested in E. S. McKendry, Florence Lowe Barnes McKendry, also known as Pancho Barnes, and William Emmert Barnes (R. 184–185). Extremely vigorous objection was made to the taking by the defendants appearing in *propria persona.* In August 1953 the United States moved for an order for delivery of possession. This was contested by defendants who moved to dismiss and to set aside the decree on the Declaration of Taking (R.

17–20, 187). The proceeding was alleged to be brought in bad faith and in violation of statute and it was also claimed that the estimate of just compensation was made in bad faith (R. 19–21). Extensive hearings at which evidence, primarily oral testimony, was presented were had in September 1953, October 1953 and February 1954 (R. 187–188, 218–459). Judge Beaumont, in March 1954 denied the defendants' motions and ordered delivery of possession by May 22, 1954 (R. 29–34). After several extensions possession was finally delivered in August 1954 (R. 187). On January 31, 1955, this Court dismissed, for lack of finality, attempted appeals from denial of the motion to dismiss and the motion to set aside the Declaration of Taking and dismissed as moot an appeal from a temporary injunction issued in February 1954 restraining defendants from constructing buildings on the lands (R. 49–54).

Appellant's attack upon the taking was continued by the filing in April 1955 of a motion to dismiss (R. 54–56) and a motion to set aside the Declaration of Taking and supporting affidavit (R. 57–69). "Supplemental Specific Information" on these motions was filed May 12, 1955 (R. 70–81). This document referred to the changes in the Declaration of Taking and alleged that unnamed attorneys and others had described it as "manufactured", "forged" and "fraudulent" (R. 81). On June 1, 1955, the motion to dismiss was supplemented to allege invalidity because of the changes (R. 82–89).

The various grounds of attack upon the taking were heard by Judge Jertberg at hearings in June 1955. Of present importance is the submission of an affidavit of Richard Lavine, an Assistant United States Attorney, to which is attached photostatic copies of the documents in the United States Attorney's office relating to institution of the proceedings (R. 99–129). This affidavit was admitted after Pancho Barnes had cross-examined Assistant United States Attorney Joseph McPherson concerning the changes and he stated, "I have the whole file there and you are at liberty to inspect it for that purpose" (R. 554). There was also submitted the affidavit of August Weymann, who was in charge of the case at the time it was filed, narrating the substance of the matters shown by the files (R. 130–136). At the close of the hearing Pancho Barnes was given until July 1 to file an affidavit confined to rebuttal of those filed in the proceeding (R. 571). On July 5 her affidavit was filed which *inter alia,* attacked the exhibits attached to the Lavine affidavit because they were photostatic copies of documents in the United States Attorney's files (R. 146–159).

In October 1955, Judge Jertberg denied the motions. He dealt with the various objections to the taking under six grounds; the last being the charge that the Declaration of Taking was fraudulent, manufactured or forged (R. 161–162). After brief discussion he concluded (R. 168–169) that "the Declaration of Taking in question was and is a valid

document and is neither forged, manufactured nor fraudulent" (R. 169).

Compensation was determined by a jury, which, by verdict returned in June 1956 found the value as of February 27, 1953 to be $337,500 (R. 183–185). In entering judgment the Court awarded appellants interest from February 27, 1953, upon the amounts by which the verdict exceeded deposits made (R. 192–193). It denied a claim of the United States for deduction of three items all of which resulted because of the delay in obtaining possession. These were (1) rent during the period possession was withheld (2) a deduction because two structures—a dance hall and defendant's residence—included in the valuation were destroyed by fire before possession was delivered and (3) a deduction for various items such as plumbing, air-conditioners, etc., included in the valuation but claimed to be missing when possession was delivered. Appropriate judgment was entered (R. 194–196) and, after a new trial was denied, this appeal followed (R. 201–202).

## ARGUMENT

### I.

### The declaration of taking was valid

*A. The declaration of taking conformed in every respect to the requirements of the statute:* The Declaration of Taking Act requires that the declaration shall contain or have annexed thereto five specified items and shall be signed by the authority empowered by law to acquire the lands. (See *infra,* p. 16.) The declaration in the present case was so signed and conformed to every requirement of the statute. (See

R. 7–12). Only one word was changed in the text of the declaration, which was the deletion of the word "amended" from paragraph 2 (R. 9). The declaration as executed and as filed was in strict accordance with every requirement of the statute and was, therefore, valid.

*B. The changes in the heading of the declaration of taking were not material alterations rendering the declaration void:* The declaration in this case was changed to reflect the decision to file a separate case covering these lands rather than amending an existing proceeding to include them. The legal effect of the declaration was the same whichever procedure was employed. As appellant's own citations show, to be material an alteration of an instrument "is one that works some change in the rights, interests, or obligations of the parties to the writing" (Br. 17, 20–21). As the Court put it in *Cities Service Oil Co.* v. *Viering,* 404 Ill. 538, 89 N. E. 2d 392 (1949): "But it is clear that the alteration of a written instrument, by the elimination of words which had no effect at the time the contract was signed and delivered, could not be an alteration changing the legal effect of the instrument."

The caption of the Declaration of Taking was not required by statute and was used mainly for the purpose of identification of the case where it could be found. The caption could have been removed by scissors without changing to the slightest degree the nature of the instrument. Change to reflect the correct case title and docket number was not, we submit, a material alteration.

In this connection, regard must be had to the division of authority between the Attorney General and the officials of agencies seeking to acquire land. It is the officials of those acquiring agencies who determine whether condemnation of particular land is necessary or desirable. Likewise, it is for those acquiring agency officials to determine whether a Declaration of Taking should be filed at the time of institution of the proceedings or at some later date. But once the request to institute proceedings or the Declaration of Taking has been transmitted to the Department of Justice, jurisdiction to determine all matters in connection with the case is vested in the Attorney General. See *Clark* v. *United States,* 155 F. 2d 157 (C. A. 8, 1946). As the court below put it, "The Secretary of the Air Force determined that the land would be condemned. The Attorney General determined the manner of its acquisition. [citations]" (R. 169, see also R. 560–561). Thus, it was the function of the Attorney General to determine whether it was more desirable to acquire this land in separate proceedings or by amending pending proceedings. The change in the caption simply reflected the Attorney General's decision that a separate suit would be filed and did not vary any term or condition which the Secretary of the Air Force had authority to specify. It could not, therefore, render the Declaration of Taking void.

Moreover, to the extent that the Secretary of the Air Force could have any voice in the question whether another case should be brought, he concurred

in and ratified the Attorney General's determination. A copy of the complaint and the decree on the Declaration of Taking reflecting the fact of institution of a separate suit and giving its title and docket number was sent to him a few days after the case was filed (R. 128–129). Subordinate officers of the Department of the Army which handled such matters in behalf of the Air Force were fully advised of the changes and were furnished a corrected first page of the Declaration of Taking (R. 118–120, 123–126). No objection was made to the change in procedure. Instead in July 1956, an additional deposit was made (R. 192). Plainly, any defects in the procedure have been ratified by the acquiring official.

That no material alteration has been made is apparent from the fact that no substantial right of appellants was affected by the change. Whether the land was condemned in one proceeding or another made no difference to appellants. They argue that the date of taking was accelerated by 4 days (Br. 17–20). But there is nothing to indicate any change in value or any reason why a 4-day difference produced any prejudice to appellants. And appellants' computations are faulty because they assume that had the original plan of including these lands in the pending proceeding been followed, no steps would have been taken until the check was received on February 20, 1953 (Br. 19). But it is clear that it was the necessity of obtaining approval from Washington of the change of procedure that delayed proceedings during February and that, except for the

change, the case would probably have been filed earlier. While of no present importance, we disagree with appellant's assertion that a supplemental complaint rather than simply amendment of the complaint would have to be filed and that the court would have discretion whether to allow it. The mistake is, we think, in the narrow meaning appellants give "amendment" in Rule 71A(f). Ordinary civil litigation deals with rights which have accrued from past transactions such as breaches of contracts or commission of torts and amendments or supplements may prejudice defendants because of limitations on time or damages recoverable and the like. But condemnation deals with the present, is the transaction itself, and amendment to add new parties, to correct land description or to add new tracts for the same project cannot prejudice the defendants. Consequently Rule 71A(f) liberalizes amendment rules to dispense with the necessity of court approval since the reason for requiring court approval in ordinary cases does not apply. The same reason applies, we submit, whether the amendment adds a new party or a new tract of land and, hence, the same rule as to amendment applies.

*C. The objection to consideration of documents from the files of the United States Attorney's office lacks merit:* Appellants complain that the exhibits attached to the affidavit of Assistant United States Attorney Lavine are photostatic copies of documents in the file of the United States Attorney's office. There are three short answers to this argument. First, the

affidavit of Mr. Lavine plainly constitutes proper authentication within the meaning of 28 U.S.C. 1733(b) where he states under oath that the photostats are true copies of the original documents in the United States Attorney's file (R. 99). Appellants' argument would require the introduction in evidence of the original documents which is the very thing the statute was intended to avoid. The case of *Yung Jin Teung* v. *Dulles,* 229 F. 2d 244 (C. A. 2, 1956), the sole authority cited by appellants (Br. 28–29) is plainly irrelevant for the primary reason that there the Assistant United States Attorney's affidavit concerned, not documents in the United States Attorney's file, but photostatic copies of a report in the files of the Department of State. Moreover that report, the court held, could not itself be admissible because the person who signed it was not shown to have personal knowledge of the facts to which it related. Here, there cannot be any objection to admission of the original documents, for example, the original telegram from the Assistant Attorney General authorizing the procedure of filing a separate case.

A second answer to appellants' argument is the fact that the United States Attorney's file was produced in court and as Mr. McPherson stated to Pancho Barnes (R. 554) "you are at liberty to inspect it for that purpose". Pancho Barnes did not then object to the use of copies rather than originals nor make any claim that the copies were, in any respect, erroneous or incomplete. Instead she quoted from the documents in cross-examining Mr. McPherson (e. g.,

R. 556). We submit that the objection made later in her rebuttal affidavit came too late. The court did not, as appellant states (Br. 26) prohibit appellant from objecting to matters contained in the affidavit. Mrs. Barnes, who was conducting the case without benefit of counsel had indicated an idea that she had a choice whether or not the affidavits would be filed and the court pointed out that motions of this type are ordinarily heard upon affidavits (R. 570). The record shows that the trial judges have been more than patient in this case and did not foreclose Mrs. Barnes from urging any position or objection.

A third answer to appellant's objection is that the case does not turn upon the documents attached to Mr. Lavine's affidavit. The facts shown by the documents likewise appear from the affidavits of Assistant United States Attorney Weymann (R. 130–136) and the oral testimony of Assistant United States Attorney McPherson (R. 542–562). The case is the same if the copies of the documents are ignored.

## II

**Even if the changes in the declaration of taking rendered it void no prejudice to appellants justifying reversal of the judgment is shown**

Since appellants have now abandoned their claim that the right to condemn their property is lacking, the only question remaining is the right to compensation. But no issue has been raised as to the amount of the judgment either with regard to the jury verdict or with regard to interest. It follows, we submit, that whether the Declaration of Taking was valid or not is a moot question.

A conclusion that the Declaration of Taking was a nullity might change the date of taking, since absent the filing of a declaration, the taking is the date possession was acquired, *United States* v. *Vilbig,* 208 F. 2d 663 (C. A. 5, 1953); *Anderson* v. *United States,* 179 F. 2d 281 (C. A. 5, 1950) cert. den. 339 U. S. 965; *United States* v. *Comparet,* 164 F. 2d 452 (C. A. 10, 1947); *23 Tracts of Land* v. *United States,* 177 F. 2d 967 (C. A. 6, 1949); See also *United States* v. *Mahwold,* 209 F. 2d 751 (C. A. 8, 1954). Possession was finally delivered in August 1954 (R. 187). There is nothing to indicate that the property increased in value substantially between February 1953 and August 1954. Rather than prejudicing appellants use of the earlier date of taking benefited them very substantially in four respects. First, interest was computed from the earlier date on $172,500 which amounts to more than $15,000 between February 1953 and August 1954. Secondly, appellants had the benefit of some $194,000 deposited during that year and a half even though they continued to occupy the property and were not charged with rent for that period. In the third place, the verdict included compensation for the dance hall and residence which were destroyed before August 1954 (R. 188) and hence would be excluded if the date of possession were the date of taking. Finally, plumbing fixtures, doors, heaters, pumps and motors would be excluded if the later date of taking controlled (R. 188). Plainly, any error in refusing to set aside the Declaration of Taking and

the decree entered thereon[1] was harmless so far as appellants are concerned.

## CONCLUSION

For the foregoing reasons, it is submitted that the judgment below should be affirmed.

Respectfully.

PERRY W. MORTON,
*Assistant Attorney General.*
LAUGHLIN E. WATERS,
*United States Attorney,*
*Los Angeles, California.*
JOSEPH F. MCPHERSON,
ALBERT N. MINTON,
*Assistant United States Attorneys,*
*Los Angeles, California.*
ROGER P. MARQUIS,
*Attorney, Department of Justice,*
*Washington, D. C.*

JANUARY 1958.

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[1] We, of course, recognize that the *ex parte* decree entered on the Declaration of Taking does not preclude condemnees from urging any objection they may have to the taking.

## APPENDIX

The pertinent portion of Section 1 of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. 258a, provides that:

> In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—
>
> (1) A statement of the authority under which and the public use for which said lands are taken.
>
> (2) A description of the lands taken sufficient for the identification thereof.
>
> (3) A statement of the estate or interest in said lands taken for said public use.
>
> (4) A plan showing the lands taken.
>
> (5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.



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